APPELLATE CIVIL.

Before Sir W. Comer Petheram, Knight, Chief Justice, and Mr. Justice Banerjee.

1889 *Jan. 8th.*

DOORGA SINGH AND OTHERS (DEFENDANTS Nos. 1—4) *v.* SHEO PERSHAD SINGH AND OTHERS (PLAINTIFFS) AND ANOTHER (DEFENDANT).*

Sale for arrears of Revenue—Fraud—Bidders, Dissuasion of.

In a suit by some of the co-sharers in a mouzah against the others to set aside a sale for arrears of revenue, the finding of the Court of first instance established that a certain co-sharer in a mouzah had intentionally withheld the payment of a small arrear of Government revenue, and had thereby caused the property to be sold under Act XI of 1859, purchasing it himself at a small sum in the name of certain other persons; and had also dissuaded certain intending bidders from bidding at such sale:

Held, that the evidence did not warrant such a finding, but that assuming these facts to have been established, the right of the co-sharer to buy up the estate at the Revenue sale was not based upon any right or interest common to himself and his co-sharers, and that, in the absence of misrepresentation or concealment, the fact that he had intentionally defaulted as found, did not constitute fraud; nor did the fact, that he had deterred others from bidding for the property, necessarily constitute an act of fraud.

Bhoobun Chunder Sen v. *Ram Soonder Surma Mozoomdar* (1) distinguished.

THE plaintiffs, who were nine-anna shareholders in a certain mouzah, brought this suit to set aside a sale held for arrears of revenue on the 6th June 1883.

The defendants, Nos. 3 to 23, were the owners of a four-anna share in this mouzah, the remaining three-anna share of which was held by two persons who had opened out a separate account with the Collector with regard to their share. The arrear, for which the property was advertised and put up for sale, amounted to twelve annas eight-and-a-quarter pie. It further appeared that, at the time this arrear fell due, the property was under attachment on account of road-cess and other taxes.

On the 4th June (two days prior to the sale), defendant No. 6 applied to the Collector for permission to pay the amount in

* Appeal from Original Decree, No. 308 of 1886, against the decree of Baboo Sham Chunder Dhur, Subordinate Judge of Sarun, dated the 21st August 1886.

(1) I. L. R., 3 Calc., 300.

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arrear, and an order was passed on such application, allowing him to pay all Government demands, including this arrear of twelve annas eight-and-a-quarter pie. Defendant No. 6, however, failed to pay in such arrears, and on the 6th June the property was sold and purchased at a low price by him in the names of defendants Nos. 1 and 2; and subsequently certain other of the defendants were made co-sharers in such purchase. The plaintiffs sought to set aside the sale, alleging the fraud above-mentioned, and, at the hearing, produced evidence showing that certain intending bidders had been dissuaded from bidding at the sale by certain of the defendants, and although fraud was alleged in the plaint there was no specific prayer for equitable relief.

The defendants denied these facts and alleged that this arrear was in reality due by the plaintiffs.

The Subordinate Judge, although doubting whether a sale under Act XI of 1859 could be set aside on the ground of fraud, found that the fraud above-mentioned had been established, and held, on the authority of the case of *Bhoobun Chunder Sen* v. *Ram Soonder Surma Mozoomdár* (1), that the plaintiffs were equitably entitled to relief, and directed the purchasers to re-convey to the plaintiffs their nine-anna share of the mouzah, on re-payment of a proportionate amount of the purchase-money to the purchasers, with interest at the rate of 4 per cent. from the day of sale.

Defendants Nos. 1, 2, 3, and 4 appealed to the High Court.

Baboo *Mohesh Chunder Chowdhry* and Moulvie *Mahomed Yusuf* for the appellants.

Baboo *Mohesh Chunder Chowdhry*.—There being no specific prayer for equitable relief the lower Court should not have granted it; the prayer of the plaint was for recovery of possession after setting aside the sale; no issue was settled as to whether the plaintiffs were entitled to this relief; on the facts alleged and found no fraud has been made out entitling the plaintiffs to relief, and the finding on the question of fraud is not substantiated by the evidence The case of *Bhoobun Chunder Sen* v. *Ram Soonder Surma Mozoomdar* (1) is distinguishable from the present.

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Mr. *Gregory*, Baboo *Mahabir Sahai* and Baboo *Amarendra Nath Chatterjee*, for the respondents, contended that the action of the defendant No. 6 was fraudulent.

The judgment of the Court (PETHERAM, C. J., and BANERJEE, J.,) was delivered by

BANERJEE, J.—This appeal arises out of a suit by the plaintiffs, respondents, to recover possession with mesne profits of a nine-anna share of a certain property, Mehal Chuck Shah Mohamedpore, after setting aside a sale, held on the 6th of June 1883, of a larger share of the mehal, that is, a thirteen-anna share, made up of the nine-anna share in suit, and of another four-anna share belonging to the defendants Nos. 3 to 23, for arrears of Government revenue due in respect of the said thirteen-annas.

The grounds upon which the plaintiffs seek to have that sale set aside are—*first*, irregularity in the sale; and, *secondly*, fraud on the part of the defendants. The irregularities set out in the plaint need not be considered here, as the judgment of the lower Court, as to the existence and effect of those irregularities, was given against the plaintiffs, and no cross-objections have been urged before us against that judgment. We would only add that, upon the face of the judgment, there does not seem to be any ground for holding that the sale was bad by reason of any irregularity.

The fraud alleged in the plaint is said to have consisted in this, that the property was sold for a very small amount of arrear, less than one rupee; that the plaintiffs were not aware of the existence of the arrear; that the defendants, the plaintiffs' co-sharers, intentionally left this small amount unpaid, with the object of purchasing this property; and that they purchased the property themselves for a price which is less than its proper value. One of the plaintiffs was examined as a witness in the case. He was asked to state in what the fraud consisted, and he stated that it consisted in the facts alleged in the plaint of which the substance has been given above.

It appears that, in the evidence adduced on behalf of the plaintiffs, an additional element of fraud was introduced, namely

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that the plaintiffs' co-sharers, when bidding at the auction, dissuaded intending purchasers from buying. I should add here that the plaintiffs further alleged in their plaint that their co-sharers bought the property *benami* in the name of the defendant No. 1.

The defence was that there was no fraud; that the arrear that was due was due really from the plaintiffs; that the purchase by the defendant No. 1 was not a *benami* purchase; and that the property did not sell for anything less than its fair price.

The Court below, as I have already said, decided against the plaintiffs upon the question of irregularity, but it gave the plaintiffs a decree to the effect that the defendant Durga Sing and his co-sharers in the purchase do reconvey to the plaintiffs the nine-annas share of the property upon receiving from them a proportionate amount of the purchase money with interest at the rate of 4 per cent. from the date of payment thereof; and it gave the plaintiffs that decree upon the ground that the defendants, the purchasers, were guilty of fraud in causing the sale of the property in the manner alleged in the plaint, and in dissuading intending purchasers from buying.

Four of the defendants have appealed against that decree—the defendants Nos. 1 to 4—and the main grounds urged on their behalf are—*first*, that the Court below was wrong in giving the plaintiffs the decree for equitable relief that it has given when the plaintiffs did not ask for any such relief but only sought to recover possession after setting aside the sale, and when the issues raised in the case did not embody the questions necessary to be decided before the plaintiffs could be held entitled to that relief; *secondly*, that upon the facts alleged in the plaint, or found by the Court below, no fraud was made out such as should entitle the plaintiffs to relief; and, *thirdly*, that upon the evidence the Court below was wrong in finding certain facts in the plaintiffs' favour which were said to constitute the alleged fraud.

With reference to the first contention, we do not think the appellants are entitled to succeed upon it. It might be possible that, by reason of the frame of the suit and of the issues,

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raised in the Court below, the appellants were precluded from raising various points in their defence and adducing evidence to substantiate those points. But, as all the necessary parties are before the Court, and the plaint contains a statement of all the necessary facts, we do not think that such a bare possibility of prejudice would entitle the appellants to succeed in this appeal, unless it was shown, or suggested, how they might have been actually prejudiced. As nothing has been shown, or suggested, to make this out, we think this ground must fail.

But we think the appellants are entitled to succeed upon the second and third grounds. We shall consider those grounds separately. The facts alleged in the plaint together with the additional fact noticed above, which was developed in the evidence, come, shortly stated, to this—that the defendants, who were co-sharers with the plaintiffs in the property in arrear, intentionally withheld payment of a certain portion of the Government revenue due in respect thereof, and bought the property themselves, after having dissuaded others from bidding. And the question is,—Do these facts constitute any fraud, considered singly, or collectively? The Court below has answered this question in the affirmative, and given the plaintiffs a decree, relying upon the case of *Bhoobun Chunder Sen* v. *Ram Soonder Surma Mozoomdar* (1). But that case is clearly distinguishable from the present. There the defendant undertook to apply to the Collector on behalf of all the co-sharers to save the mehal from the impending sale, and having sent his co-sharers away, with the assurance that he would do everything to protect their interests, neglected to make any application, and bought the estate himself. That was a clear case of fraud. Here it is not even suggested that the defendants in any way prevented the plaintiffs from becoming aware of the existence of the arrear, or from paying it off, as they could if they chose. Every co-sharer in a zemindari may, if he chooses, bring it to sale by not paying the revenue; but every other co-sharer can save it from sale by paying the arrear, and can recover the amount from the defaulter. The fact of the defendants being co-sharers in the property, did not clothe them with any fiduciary character, which disqualified

(1) I. L. R., 3 Calc., 300.

them from buying this property, unless it was for the benefit of all the co-sharers. The Revenue Sale Law, Act XI of 1859, contains sufficient indication to show that a defaulting co-partner is at liberty to buy the estate in arrear.—See s. 53 of the Act.

The authority of decided cases is also in support of this view. We may refer to the case of *Ram Lall Mookerjee* v. *Jodunath Chatterjee* (1), which is a somewhat similar case, as bearing upon this question. The principle applicable to the case of one of several joint tenants obtaining renewal of a lease is inapplicable to the case of a co-sharer in a zemindari buying it at a revenue sale for this simple reason. All the joint tenants having an interest in the old lease, which forms the basis of the right to obtain a renewal, the benefit of a renewal obtained by any one of them is held to belong to them all—See *Clegg* v. *Fishwick* (2). But the right of a co-sharer to buy an estate at a revenue sale is not based upon any right or interest that is common to him and his co-sharers.

If the fact then of the defendants having been co-sharers with the plaintiffs did not clothe them with any fiduciary character, and if the fact of their having committed default in the way and for the purpose alleged in the plaint did not, in the absence of misrepresentation or concealment on their part, constitute any fraud, let us see whether the additional fact of their having deterred others from bidding for the property amounted to fraud. Upon this point the only authority that can be cited in favour of the respondents is a passage in Sugden's Vendors and Purchasers, at page 93 of the 13th edition, which is to this effect—"Fraud will, of course, be a sufficient ground for re-opening the biddings. Therefore, if the parties agree not to bid against each other, the Court could re-open the biddings."

Now this passage has been considered in the case of *Carew's Estate* (3), and it has been held that there is no real authority in support of it, and that an agreement between two bidders not to bid against one another would not be a sufficient ground for annulling the sale. And in a later edition of the work

(1) 9 C. L. R., 337. (2) 1 Mac. & G., 298.
(3) 26 Beav., 187.

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the text has been altered and a note added in accordance with the above ruling—(Sugden on Vendors and Purchasers, 14th edition, p. 117).

The same view is taken in the case of *Galton* v. *Emuss* (1), and the law on the point is thus stated in the last edition of Dart's Treatise on the Law of Vendors and Purchasers (p. 121):—"An agreement between two persons not to bid against each other at an auction is legal, and such an agreement has been held to be valid where the sale has been held by order of Court." And in this Court, in a case very similar to the present, it has been held that a combination among certain purchasers not to bid against one another does not constitute any fraud or impropriety such as would have the effect of vitiating the sale—See the case of *Gobind Chundra Gangopadhya* v. *Sherajunnissa Bibi* (2).

There is, therefore, really no authority in support of the position that dissuading of bidders was necessarily an act of fraud. Now, if neither the fact of the defendants being co-sharers and buying the estate after making an intentional default in the payment of revenue, nor the fact of their having entered into combination with other bidders, separately, constituted any fraud; we do not see how, taken together, they could be said to constitute fraud. Even upon the facts found, therefore, we are unable to confirm the decision of the Court below. Of course, if the defendants had the conduct of the sale, and had dissuaded intending purchasers to bid, or if there had been misrepresentation made by these defendants as to the nature of the title, or as to the value of the property, and if, in consequence of such misrepresentation, persons had been deterred from bidding, that would have constituted fraud, and would have entitled the plaintiffs to a decree. But no such thing is proved, or even alleged here.

Whilst we think that, even upon the facts found, the appellants are entitled to succeed, at the same time we deem it right to add that we cannot agree with the Court below in the findings of fact arrived at by it, namely, in the first place, that the default was wholly intentional and made by the defendants

(1) 1 Col., 243. (2) 13 C. L. R., 1.

with the object of buying the property themselves; and in the second place, that there was really any deterring of intending bidders. And first as to whether or not the default was intentional from the beginning, this is how the facts stand. The amount of the Government revenue in arrear was, as I have stated above, very small, less than one rupee. The defendant Dip Naraian, on the 4th of June, that is, two days before the sale made an application to the Collector for permission to pay in the amount, alleging that it was through no fault of his that an arrear had fallen due. Thereupon the order passed by the Collector was to this effect—that the arrears of rent, road-cess, postal contribution, and embankment tax be taken,—and the amount due under all these heads came up to a little over Rs. 20 (see Exhibits vi, vii, pp. 38, 39 of the Paper-book). Now it appears from the evidence—and it is admitted by one of the plaintiffs, Ram Gholam Singh, who was examined as a witness in the case—that the different co-sharers had not come to a settlement as to the road-cess, and it was for that reason that the road-cess arrears were not paid. That being so, it is clear to our minds that, originally, there was no intention on the part of the defendants of allowing the mehal to get into arrears, with the object of buying it themselves. What the defendants really wanted was to obtain a settlement of their disputes as regards the payment of this road-cess. It was only when the defendant Dip Narain found from the order of the Collector, that the payment of the arrears of Government revenue alone would not be accepted, and that he had to pay not only those arrears but also the road-cess and the other items, as to which there was a dispute, if he wanted to save the mehal; that he made default in paying the amount, which the Collector ordered him to pay; and so the mehal was put up for sale. It seems that the plaintiffs' default, in paying the road-cess arrears, may well be regarded as having ultimately led to the sale.

Then as to the other fact, namely, that the defendants deterred intending purchasers from bidding. In the first place it is worthy of note, as I have already pointed out at the very outset, that this element of fraud was not alluded to in the plaint, nor even was it mentioned, when one of the plaintiffs was

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examined as a witness. It was developed in the evidence, and, from the nature of that evidence, we are not at all convinced that the fact deposed to by the plaintiffs' witnesses was true. The Court below has believed those witnesses, considering them to be respectable witnesses. We should not have felt justified in dissenting from the conclusion of fact arrived at by the Court below upon the evidence of those witnesses, if we did not find that evidence so extremely vague, as to the facts deposed to, and so very unsatisfactory, as to the circumstances which led to the presence of the witnesses at the time and place where they say they were, that we could not rightly act upon it. All that they say is, that certain of the co-sharers of the plaintiffs prohibited them and other persons from bidding as they were going to buy the property themselves. In the first place, it does not seem to be very likely that persons who went with the *bonâ fide* intention of bidding, and of bidding up to a certain amount, would so soon, and so readily, upon a mere request, be dissuaded from bidding and from making the bargain that they intended to make. We fail to discover, in the evidence, any sufficient motive that could have induced intending bidders to be dissuaded from bidding. And, in the second place, the account that these witnesses give of the reasons for their presence in the Collectorate at the particular point of time does not seem to us to be at all satisfactory.

Upon the whole, therefore, as well upon the question of law as upon the questions of fact considered above, we feel constrained to dissent from the judgment of the Court below; and we may add here that the evidence adduced to show that the plaintiffs have suffered injury by reason of their property having sold for a price below its proper value, is, in our opinion, neither satisfactory nor precise. Upon all these grounds, therefore, we think that the decree of the Court below must be set aside, and the plaintiffs' suit dismissed with costs in both Courts.

Appeal allowed.

T. A. P.

Before Sir W. Comer Petheram, Knight, Chief Justice, and Mr. Justice Banerjee.

DEBI SINGH AND OTHERS (DEFENDANTS) *v.* SHEO LALL SINGH AND OTHERS (PLAINTIFFS).* 1889 *Jan.* 21*st.*

Partition—Jurisdiction of Civil Court—Partition by Civil Court of a portion of a revenue-paying estate—Civil Procedure Code (Act XIV of 1882), *s.* 265—*Revenue-paying estate, partition of, into several revenue-paying estates.*

The meaning of s. 265 of the Code of Civil Procedure is that where a revenue-paying estate has to be partitioned into several revenue-paying estates, such partition must be carried out by the Collector.

Zahrun v. *Gowri Sunkar* (1) approved.

THIS was a suit brought in the Court of the Subordinate Judge of Gya, for the partition of a certain village which formed a portion of a revenue-paying estate. The plaintiffs, Sheo Lall Singh and Punit Singh, held 5 annas and 6 pie in proprietary right, and 4 annas as mokuraridars under the defendants.

The defendants, Nos. 1 to 7, were proprietors of the remaining 6 annas 6 pie share in this mouzah. The plaintiffs asked in their plaint that a single plot of 9 annas 6 pie might be allotted to them.

The defendants contended that the suit would not lie, and that the partition ought to be made by the Collector; that the plaintiffs as mokuraridars were not entitled to a partition of their mokurari share as against them; and also took exception to the mode of allotment of the properties asked for by the plaintiffs.

The Subordinate Judge held that the suit was maintainable by a Civil Court; that the plaintiffs were entitled to a partition of the lands held by them as mokuraridars; and he therefore decided that the plaintiffs were entitled to partition of their 5 annas 6 pie milkiat share, and of the 4 annas held by them as mokuraridars and directed the same to be made by the Civil Court Amin.

The defendants appealed to the High Court on the ground that the decree should be given effect to by the Collector and not by the Civil Court Amin.

* Appeal from Original Decree No. 254 of 1887, against the decree of Baboo Kali Prosunno Mukerjee, Subordinate Judge of Gya, dated the 24th of August 1887.

(1) I. L. R., 15 Calc., 198.

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Mr. *C. D. Linton*, for the appellants, submitted that the decisions of this Court, as well as of the Courts of the other Presidencies, show that Civil Courts have jurisdiction to determine a party's right to have his share divided, and to make a decree accordingly, but the power to make a partition of lands paying revenue to Government was restricted to the Collector. In other words, s. 265 of the Code of Civil Procedure, coupled with s. 29 of the Partition Act (Bengal Act VIII of 1876), placed the execution of the decree entirely in the hands of the Collector, and in support of his contention referred to s. 396 of the Code of Civil Procedure, which provided for the partition of immoveable property not paying revenue to Government, and cited the following cases:—

Chunder Nath Nundi v. *Hur Narain Deb* (1); *Damoodur Misser* v. *Senabutty Misrain* (2); *Badri Roy* v. *Bhugwat Narain Dobey* (3); *Zahrun* v. *Gowri Sunkar* (4); *Ramanuja* v. *Virappa* (5); *Parbhudas Lakhmidas* v. *Shankarbhai* (6); and *Dev Gopal Savant* v. *Vasudev Vithal Savant* (7).

Mr. *R. E. Twidale*, Baboo *Golap Chund Sircar* and Baboo *Nil Kant Sahai*, for the respondents.

The judgment of the Court (PETHERAM, C.J., and BANERJEE, J.,) was delivered by

PETHERAM, C.J.—This is an appeal from a decision of the Subordinate Judge of Gya, in a suit brought by the plaintiffs against the defendants to partition the plots of land, contained in a revenue-paying estate among the persons entitled to the estate, but there is no claim in the plaint to have the estate or the revenue payable to Government partitioned, in the sense that it should be turned into several revenue-paying estates.

The Subordinate Judge has decreed the suit, and has directed that the Civil Court Amin shall give effect to it, and the only ground of appeal here is, not that the decree is wrong, but that the decree must be given effect to, not by the Civil Court Amin,

(1) I. L. R., 7 Calc., 153.
(2) I. L. R., 8 Calc., 537.
(3) I. L. R., 8 Calc., 649.
(4) I. L. R., 15 Calc., 198.
(5) I. L. R., 6 Mad., 90.
(6) I. L. R., 11 Bom., 662.
(7) I. L. R., 12 Bom., 371.

but by the Collector of the district, and various cases have been cited before us in support of that view. It is said that, by s. 265 of the Code of Civil Procedure, whenever the estate, in respect of which partition has taken place, is a revenue-paying estate, that partition must be carried out by the Collector. But it seems to us that the meaning of that section is, that where a revenue-paying estate has to be partitioned into several revenue-paying estates, that partition must be carried out by the Collector, because the revenue is affected, and it is for the Collector to say how much revenue shall be assessed upon each portion of the estate, so that there may be a proper security for that revenue, and we think that that is the view which was intended to be taken by Mr. Justice Prinsep and Mr. Justice Pigot in the case of *Zahrun* v. *Gowri Sunkar* (1).

In that case, the learned Judges say—"S. 265 of the Code of Civil Procedure of 1882, which is generally a re-enactment of s. 225 of the Act of 1859, evidently contemplates the existence of the jurisdiction of the Civil Courts to try suits for partition of estates, or for the separate possession of the share of an undivided estate paying revenue to Government, but at the same time it leaves it to the Collector only to give due effect to any order passed by a decree of a Civil Court." And then they go on to say,—"The effect of s. 29 of the Butwarrah Act, as we understand it, is, that the rights of the parties as between themselves in respect to any portion of the estate may be determined by the Civil Court, but that any decree of the Civil Court will not affect the joint liability of the sharers in respect to the payment of the entire revenue assessed on the estate until the Collector has taken proceedings in accordance with that Act."

It seems to us that the meaning of the learned Judges in that case was to say, that the Civil Courts might deal with the matter and might give effect to their decisions, so long as they did not attempt to affect the joint liabilities of the sharers in respect of the whole estate as it stood before. That decision we think does not differ from the various decisions which have

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been cited before us, in which it seems to us that the learned Judges, when speaking of the partition of revenue-paying estates were speaking of the partition of such estates into several revenue-paying estates. That is a totally different thing from the partition of the lands within an estate as between the sharers leaving the whole estate liable for the whole revenue, which is the case before us.

For these reasons we think that this case is concluded by the case of *Zahrun* v. *Gowri Sunkar* (1) which I have cited, and with which we entirely agree, and this appeal must be dismissed with costs.

T. A. P. *Appeal dismissed.*

CRIMINAL REVISION.

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January 14.

Before Mr. Justice Pigot and Mr. Justice Macpherson.

GANOURI LAL DAS (AND OTHERS) *v.* THE QUEEN-EMPRESS.*

Rioting—Unlawful Assembly—Right of Private defence of property—Penal Code (Act XLV of 1860), *ss.* 97, 103, 104, 105, 141 *and* 147.

A party of persons, consisting of some five peadas and a number of coolies sufficient for the work to be done, went to a spot on a river flowing through the lands of *M* for the purpose of either repairing or erecting a *bund* across it to cause the water to flow down a channel on to the lands of their master *T*. The river at the time was almost dry, and the party did not go armed ready to fight or use force, and they did not during the subsequent occurrence use force. Having arrived at the spot about 10 A.M. they proceeded to work at the *bund* until the afternoon. At about 4 P.M. a body of men, consisting of about 1,200 in all, many of them armed with *lathies* and headed by the prisoners, who were servants of *M*, which had been seen collecting together during the day, proceeded to the spot, and about 25 or 30 of them attacked *T's* men, some five of whom were more or less severely wounded with the *lathies*.

The occurrence resulted in the conviction of some of *M's* servants for rioting under s. 147 of the Penal Code.

* Criminal Revision No. 405 of 1888, against the order passed by C. A. Wilkins, Esq., Sessions Judge of Bhagulpore, dated the 6th of November 1888, affirming the order passed by Baboo Poorno Chunder Mitter, Deputy Magistrate of Bhagulpore, dated the 24th of September 1888.

(1) I. L. R., 15 Calc., 198.